Conversent Communications

VIA OVERNIGHT & ELECTRONIC MAIL

May 11, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: **DTE 04-33 - Petition Of Verizon New England, Inc. For Arbitration Of An Amendment To Interconnection Agreements With Competitive Local Exchange Carriers And Commercial Mobile Radio Service Providers In Massachusetts Pursuant To Section 252 Of The Communications Act Of 1934, As Amended, And The *Triennial Review Order***

Dear Ms. Cottrell:

Enclosed for filing please find an original and seven (7) copies of Conversent Communications of Massachusetts, LLC's Response to Verizon's Motion to Hold Proceeding in Abeyance until June 15, 2004.

Do not hesitate to contact me if you have any questions.

Very Truly Yours,

Gregory M Kennan

Gregory M. Kennan
Director of Regulatory Affairs & Counsel
Conversent Communications of Massachusetts, LLC

GMK/cw

Enclosure

cc: Tina W. Chin, Hearing Officer
Paula Foley, Assistant General Counsel
Michael Isenberg, Director, Telecommunications Division
April Mulqueen, Assistant Director, Telecommunications Division

Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment To Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	**D.T.E. 04-33**

CONVERSENT'S RESPONSE TO VERIZON'S MOTION TO HOLD PROCEEDING IN ABEYANCE UNTIL JUNE 15, 2004

Conversent Communications of Massachusetts, LLC ("Conversent") agrees in principle that at present the efforts of the Department and parties are better devoted to negotiation than litigation. Nevertheless, the Department should not wait until June 16th to address what happens if negotiations do not succeed. Instead, the Department should act now to prevent the chaos that will ensue if on that date Verizon carries out its stated intention to cease unbundling dedicated interoffice transport and high-capacity loops, on the ground that the unbundling requirements for those elements were vacated in *United States Telecom Association v. FCC,* No. 00-1012 (D.C. Cir. March 2, 2003) ("*USTA II"*).

Specifically, the Department should require Verizon to continue offering UNEs — particularly dedicated interoffice transport (including dark fiber interoffice transport) and high capacity loops — at the rates, terms and conditions in Verizon's wholesale tariff until the FCC establishes new rules or the existing FCC rules are reinstated. Also, the Department should require Verizon to perform routine network modifications when provisioning high-capacity loops, as mandated by the *Triennial Review Order ("TRO"),* without need to amend existing

interconnection agreements and without new charges. By so doing, the Department will preserve the stability of telecommunications markets and prevent disruption of telecommunications competition in Massachusetts.

Discussion

I. The Department Should Require Verizon to Continue to Provide Dark Fiber Interoffice Transport and High-Capacity Loops at the Rates, Terms, and Conditions in Existing Interconnection Agreements and its Wholesale Tariff.

Conversent is concerned that if the *USTA II* decision goes in effect, Verizon will exploit the absence of federal unbundling rules by ceasing to provide dark fiber, DS-1, and DS-3 dedicated transport, high-capacity loops, and other UNEs at TELRIC rates and will substitute overpriced and unnecessary special access services.

Verizon has publicly stated its view that once the *USTA II* mandate is issued on June 15th, it no longer is required to provide the UNEs subject to the *vacatur* in that case. For example, in comments filed in a New York Public Service Commission proceeding to examine Verizon's obligations after *USTA II,* Verizon said, "the *USTA II* order also vacated the FCC's rules concerning the provision of dedicated transport on an unbundled basis. Accordingly, once the stay of that order expires, Verizon will not have any obligation to provide dedicated transport on an unbundled basis at TELRIC prices." *In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271,* Case 04-C-0420 ("NY Post-*USTA II* Proceeding"), Initial Comments of Verizon New York Inc. on the Implementation of a UNE Rate Transition Plan Pursuant to the Pre-Filing Statement, April 16, 2004, at 9.

Similarly, in a federal court action challenging its obligation to perform routine network modifications when provisioning high-capacity loops, Verizon stated, "once the D.C. Circuit's

mandate in *USTA II* takes effect, Verizon will no longer be required to provide [a CLEC] with high capacity facilities . . . ." *Verizon Virginia Inc. v. Cavalier Telephone, LLC,* Civil Action No. 3:04CV230, Plaintiff's Motion to Hold Proceeding in Abeyance (and Memorandum in Support), filed April 8, 2004, at 2 (copy attached).

Verizon has publicly proposed to substitute various special access services for the UNEs it claims it no longer must unbundle at TELRIC rates once *USTA II* becomes effective. Verizon's prices for these services are orders of magnitude greater than the prices for analogous UNEs at TELRIC rates. Forcing CLECs to use these special access services will devastate telecommunications competition in Massachusetts. For example, in the NY Post-*USTA II* Proceeding, Verizon has proposed, as a substitute for UNE dark fiber dedicated transport, the ring mileage rates for its Intellilight Optical Transport Service ("IOTS") — a designed, managed, controlled, SONET-based, lit optical transport service. As Conversent showed in that proceeding, IOTS is an inappropriate proxy for dedicated dark fiber transport,[1] and Verizon's

[1] The tariffs for the two services show how different they are. The differences between the services include, but are not limited to, the following: IOTS is a special access-type lit service customized through intricate design, and highly managed, controlled and serviced by Verizon personnel. The customer obtains (at a premium price) a diversely routed ring architecture or topology designed to provide "managed optical transport of multiple protocols." VZ Tariff FCC No. 11, § 7.2.19(A). Of course, Verizon's tariffed charges are designed to compensate Verizon for all the services and functions associated with designing, operating and "managing" the various levels of transmission capacity that are offered. Under IOTS, Verizon will make available transmission of at least 15 different protocols, ranging from SONET OC3 through OC48 and Gigabit Ethernet, using specific industry technical specifications. *Id.* § 7.2.19(C)(5). Through IOTS, a customer may connect multiple locations. *Id.* § 7.2.19(B). Verizon engineers will perform the design and configuration requirements to provision IOTS ring and Verizon technicians will construct the ring after it and the customer have mutually agreed upon its design. *Id*

By contrast, under Verizon's dark fiber offering, the CLEC designs, constructs, configures, and manages its own network. This allows a CLEC to design and manage its network, but requires the CLEC to incur the necessary expense to do so. All that Verizon provides the dark fiber customer is an unlit inert pair of fiber optic strands *on an as-is basis*, between two Verizon central offices, nothing more, nothing less. See VZ Tariff DTE MA No. 17, §§ 17.1.1.A, 17.1.2.A.2, 17.3.1.B. And, since the CLEC must be collocated in both offices, the CLEC must place its own (not Verizon's) electronic equipment on each end of the fiber cable in order to "light" the cable so as to provide the necessary transmission capability. *Id.* §§ 17.1.2.A.2, 17.3.1E. In addition, Verizon will only provide dark fiber if spare, unused strands are available; it will not construct dark fiber facilities, nor will Verizon introduce additional splice points to accommodate dark fiber requests. *Id.* § 17.1.1B. Verizon only warrants that the dark fiber was up to specifications at the time it was installed. It does not guarantee that the transmission characteristics of dark fiber will remain constant over time, and takes no responsibility for risks associated with the introduction of future splices

proposed rate for the IOTS service — $1100 per month per mile for the first 20 miles, $520 per month per mile for additional miles[2] — would result in a rate increase of greater than 1700 percent in New York. NY Post-*USTA II* Proceeding, Reply Comments of Conversent Communications of New York, LLC, April 23, 2004, at 9, 14. The effect in Massachusetts undoubtedly would be of the same magnitude.

To prevent disruption of telecommunications competition and destabilization of telecommunications markets in the Commonwealth, the Department should mandate that Verizon continue to provide unbundled dark fiber dedicated transport and high-capacity loops in Massachusetts until the FCC issues its order on remand or the D.C. Circuit or Supreme Court reverses the *USTA II* decision. It makes no sense to permit Verizon to commence disconnection procedures or to invoke other change of law provisions in the various interconnection agreements, when, as explained below, the likely result of further FCC or judicial proceedings will be reinstatement of the majority of UNEs subject to the *USTA II* remand.

Any attempt by Verizon to discontinue access to all dark fiber interoffice transport and high capacity loops under section 251(c)(3) would be an inappropriate and overbroad response to the *USTA II* decision. As we pointed out in our April 15, 2004 reply to Verizon's response to the parties' motions to dismiss in this case, it is inconceivable that all currently unbundled dark fiber would fail to satisfy the "necessary" and "impair" tests of § 251(d)(2). To the contrary, the FCC likely will mandate that most or all of these dark fiber facilities satisfy the § 251(d)(2) standard and must continue to be unbundled under § 251(c)(3). Notably, in the *Triennial Review Order ("TRO"),* all five FCC Commissioners ruled that dark fiber dedicated transport should remain a

---

on the dark fiber. *Id.* § 17.2.1.C-.D. The CLEC is responsible for designing its own system, and must go through a complicated ordering process to acquire dark fiber form Verizon. *Id.* § 17.1.3.

[2] VZ Tariff FCC No. 11, §31.7.21.

UNE. In addition, the D.C. Circuit in *USTA II* did not rule that all dark fiber failed to satisfy the § 251(d)(2) "necessary" and "impair" standards.

Likewise, it is inconceivable that all high-capacity loops will be removed from the list of network elements that must be unbundled at TELRIC prices. At the outset, Verizon is wrong in claiming that the *USTA II* mandate will eliminate the unbundling requirement for such loops. *USTA II* simply does not address high-capacity loops. Verizon fails to explain how the Court of Appeals' mandate resulting from an opinion that does not address the issue could obviate its legal obligation to provide such loops.

If the *USTA II* mandate does affect high-capacity loops, the effect could only result from extending to such loops the Court's invalidation of the FCC's sub-delegation of decision-making authority to the states. Nothing in *USTA II* can be read to invalidate the FCC's finding of a national presumption that carriers are impaired in the absence of unbundled high-capacity loops. Nor did the Court criticize the impairment triggers for high-capacity loops. Like dark fiber, all five FCC Commissioners voted to unbundle high-capacity loops. Thus, the overwhelmingly likely result on any remand — if indeed the issue is subject to the remand — will be that the FCC will re-adopt the same substantive test but retain to itself the decision-making authority.

By requiring Verizon to provide continued access to dark fiber transport and high-capacity loops, the Department would preserve the likely outcome at the federal level. Allowing Verizon to discontinue all dark fiber UNE transport and high-capacity loops now would needlessly disrupt and destabilize the Massachusetts telecommunications market and eliminate customer choice. To prevent this harm, the Department should require Verizon to continue to provide dark fiber and high-capacity loops under the rates, terms, and conditions in its wholesale tariff.

Conversent's request is modest — to have the Department maintain the status quo during the period of legal uncertainty that exists until the FCC can act or the *USTA II* decision's fate is determined by further judicial proceedings. As pointed out in our April 15 reply, the Rhode Island Commission Arbitrator recently did just that in that state's analogous case. He decided that "the current terms of [interconnection agreements] with CLECs for which [Verizon] has petitioned for arbitration can continue in effect as written in regards to those issues reversed, remanded and soon to be vacated by the D.C. Circuit Court. In other words, the status quo prevails." *In re: Petition of Verizon-Rhode Island For Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Rhode Island to Implement the Triennial Review Order,* Docket No. 3588, Procedural Arbitration Decision at 10 (April 9, 2004) ("RI Decision"). The same result should obtain in Massachusetts.

II. The Department Should Require Verizon to Perform Routine Network Modifications at Current UNE Prices without Amending Interconnection Agreements or the Wholesale Tariff.

Verizon takes the position that the *TRO*'s discussion of "routine network modifications" in connection with the provisioning of DS-1 UNE loops constitutes a "change of law" from previous obligations, such that interconnection agreements must be amended to include such modifications — along with substantial new fees — before Verizon will perform the routine modifications that the FCC requires. This is an incorrect interpretation of the *TRO.*

In the *TRO,* the FCC rejected Verizon's "no facilities" policy, which formed the basis of the dispute leading to the FCC's clarification concerning routine network modifications. The Verizon policy cited in the *TRO* was itself a change that Verizon unilaterally imposed on Conversent and other CLECs in approximately May of 2001; prior to that time, Verizon typically

performed routine modifications when provisioning DS-1 loops. RI Decision at 11; *In re Verizon Maine: Petition for Consolidated Arbitration,* Docket No. 2004-135, Examiner's Report, May 6, 2004 ("Maine Examiner's Report"),[3] at 11. As the Rhode Island Arbitrator noted,

> If the TRO really did constitute a change of law and created a completely new legal obligation for VZ-RI, the question must be asked as to why, for so many years, did VZ-RI make routine network modifications at TELRIC rates? . . . VZ-RI made routine network modifications at TELRIC rates for many years. Undoubtedly, VZ-RI performed these tasks because of some legal obligation under federal or state law whether it be in [interconnection agreements], tariffs, regulatory orders or statutes. VZ-RI is an aggressive competitor; it would not provision wholesale services merely out of compassion for unfortunate, little CLECs.

RI Decision at 11.

In addition, the FCC found that Verizon performed far less extensive routine modifications in connection with UNE loop orders than other major ILECs. *TRO* ¶ 639 n. 1936. The FCC's finding "that attaching routine electronics, such as multiplexers, apparatus cases, and doublers to high-capacity loops is already standard practice in most areas of the country" (*TRO* ¶ 635) shows that Verizon's policy did not reflect the prevailing view of pre-*TRO* law. Thus, in the *TRO*, the FCC merely affirmed Verizon's obligations to provision DS-1 UNE loops where certain routine network modifications are required.

In other words, the FCC did not change the law, but clarified Verizon's obligations under existing law. This being the case, the "change in law" provisions in Verizon's interconnection agreements are not invoked, and no further negotiation or amendment is necessary for Verizon to comply with its legal obligation to provide routine network modifications as part and parcel of a DS-1 UNE loop.

The Rhode Island Arbitrator confirmed this interpretation. In particular, in dismissing any "routine network modification" language from Verizon's proposed TRO amendment, the

[3] http://www.state.me.us/mpuc/orders/2004/2004-135ER.pdf.

Rhode Island Arbitrator agreed that the FCC did not establish rules that departed in any way from prior rules, but merely "resolved the controversy as to whether VZ-RI had to perform routine network modifications." RI Decision at 10-11. Similarly, the Virginia State Corporation Commission ruled that the TRO established Verizon's obligations regarding routine network modifications in connection with the provisioning of DS-1 UNE loops, and required that Verizon perform such modifications under existing interconnection agreements without modification. *In re Petition of Cavalier Telephone for Injunction against Verizon Virginia for Violations of Interconnection Agreement and for Expedited Relief to Order Verizon Virginia to Provision Unbundled Network Elements in Accordance with the Telecommunications Act of 1996,* Case No. PUC-2002-00088, Final Order at 8-9 (Va. SCC, Jan. 28, 2004) ("VA Decision").[4] And, most recently, the Maine Examiner recommended that the Maine Commission rule as follows:

> Section 251(c)(3) has always required that Verizon provide access to its UNEs on a non-discriminatory basis. The FCC's new rules merely clarify what is required under that existing obligation. Thus, Verizon must perform routine network modifications on behalf of CLECs in conformance with the FCC's rules. Verizon may not require the CLEC to first sign an interconnection agreement amendment before performing the modifications.

Maine Examiner's Report at 12-13.

In addition, there is no justification for Verizon to refuse to perform such routine network modifications unless and until CLECs agree to pay substantial new charges for such work. Verizon in all likelihood is already compensated for such work as part of its Department-approved rates for DS-1 UNE loops. In the *TRO*, the FCC noted that "the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops." *TRO* ¶ 640. The Rhode Island Arbitrator and Maine Examiner made the same observation in their respective arbitration proceedings. RI Decision at 12; Maine Examiner's

[4] http://www.state.va.us/scc/caseinfo/puc/case/c020088d.pdf.

Report at 13. In addition, in January 2004, the Virginia State Corporation Commission ruled that Verizon was required to provision DS-1 loops in accordance with the requirements of the TRO at existing TELRIC prices. VA Decision at 9.

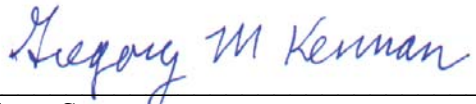
If Verizon believes that its current TELRIC rates do not compensate it for the costs of these routine modifications, then it should petition for — and show the appropriateness of — rate adjustments. It is improper, however, for Verizon to unilaterally impose additional charges that the Department has not approved. Accordingly, the Department should require Verizon to perform routine network modifications as set forth in the *TRO* when provisioning high-capacity UNE loops, without any amendment to interconnection agreements or increases in rates.

Conclusion

The Department should immediately order that Verizon continue to offer UNEs subject to the *USTA II* remand at the rates, terms, and conditions in its wholesale tariff until the FCC issues its order on remand or the D.C. Circuit or Supreme Court reverses the *USTA II* decision. In addition, the Department should require Verizon to make necessary routine network modifications when provisioning DS-1 UNE loops, without any need to amend existing interconnection agreements and without any additional charges.

May 11, 2004

Respectfully Submitted,



Scott Sawyer
Gregory M. Kennan
Conversent Communications of
Massachusetts, LLC
24 Albion Road, Suite 230
Lincoln, RI 02865
401-834-3326 Tel.
401-834-3350 Fax

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

VERIZON VIRGINIA INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:04CV230**
	)	
CAVALIER TELEPHONE, LLC, *et al.*	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MOTION TO HOLD PROCEEDING IN ABEYANCE
(AND MEMORANDUM IN SUPPORT)

On April 5, 2004, Plaintiff Verizon Virginia Inc. ("Verizon") filed its complaint seeking judicial review of a recent determination of the Virginia State Corporation Commission ("SCC"), which requires Verizon to modify its network facilities, for the benefit of Verizon's competitor (defendant Cavalier Telephone, LLC), without compensation. The SCC's determination violates federal law in that it is inconsistent with the pricing standards set forth in the Telecommunications Act of 1996 (the "1996 Act"), *see* 47 U.S.C. § 252(d)(1), the pricing regulations of the Federal Communications Commission (the "FCC"), and the terms of the FCC's *Triennial Review Order*.[1]

Verizon respectfully submits, however, that the Court should hold this case in abeyance pending the outcome of two proceedings that may either effectively moot Verizon's challenge or provide additional clarification concerning governing legal standards. First, the Court of

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

Appeals for the D.C. Circuit has vacated the FCC's rules requiring Verizon to provide unbundled access to high-capacity facilities. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). Because the network modifications at issue in this case are required to make high capacity facilities available, once the D.C. Circuit's mandate in *USTA II* takes effect, Verizon will no longer be required to provide Cavalier with high-capacity facilities and, therefore, will no longer have need to perform the network modifications at issue here.

Second, the FCC is currently undertaking a proceeding to reconsider its existing TELRIC pricing standards. *See* Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18945 (2003). Among the issues the FCC intends to clarify in that proceeding is the manner in which state commissions should provide for recovery of costs associated with "loop conditioning," that is, modification of loops to make them capable of supporting Digital Subscriber Line ("DSL") service. *See* Notice of Proceeding Termination of CCB/CPD 01-06, *Application of TELRIC Pricing to Loop Conditioning*, CCB/CPD File No. 01-06, DA 04-13 (Wireline Comp. Bur. rel. Jan. 7, 2004). The legal issues with respect to recovering the costs of modifying these loops are similar to the issues regarding cost recovery for modifications to high-capacity facilities; indeed, the FCC addressed both types of modifications in the same section of the *Triennial Review Order*. Therefore, the FCC may also be called upon in its TELRIC proceeding to clarify issues related to cost recovery for the type of network modifications at issue in this case.

Accordingly, Verizon requests that the Court hold this proceeding in abeyance pending the final resolution of the two proceedings described above. Verizon would propose to file periodic reports to inform the Court of the status of those proceedings.

CONCLUSION

For the foregoing reasons, the Court should grant the motion.

Respectfully submitted,

VERIZON VIRGINIA INC.

By Counsel

Robert M. Tyler (VSB # 37861)
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-7695
(804) 698-2197 (fax)

Lydia R. Pulley (VSB # 31191)
VERIZON VIRGINIA INC.
600 East Main Street, Suite 1100
Richmond, Virginia 23219
804-772-1547
804-772-2143 (fax)

Attorneys for Verizon Virginia Inc.

OF COUNSEL:

Aaron M. Panner
Scott H. Angstreich
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (fax)